IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the Assets in New York of Russo-Asiatic Bank,

Respondents,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent,

and

JAMES A. TILLMAN,

Petitioner,

and

JESSE C. MILLARD and UNITED STATES OF AMERICA,

Respondents.

BRIEF AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BORRIS M. KOMAR and
DAVID L. SPRUNG,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States:

James A. Tillman, a citizen of the United States, prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals to the United States Circuit to review the judgment of that Court rendered on May 7,

1947, which affirmed the judgment of the District Court for the Southern District of New York (R. 288-9) in this and in two companion actions, *U. S. Guaranty Trust Co.*, which were tried together and which were appealed upon a single record (R. 3115-7).

Statement of Matter Involved

James A. Tillman, an American national, and a resident of New York, on August 24, 1927, levied a warrant of attachment on the dollar indebtedness of defendant, Guaranty Trust Co., to Russo-Asiatic Bank, a Russian corporation, at its main office in New York, in the sum of $188,408 (R. 1658). The warrant was levied in an action by petitioner, as plaintiff, in the Supreme Court, Queens County, against Russo-Asiatic Bank, as defendant.

On September 23, 1935, judgment was entered in Supreme Court, Queens County, in favor of petitioner and against Russo-Asiatic Bank for $210,675.05 (R. 124-128).

On March 9, 1936, the District Court allowed petitioner to intervene in this action on the ground that he had a claim to the account of the Russo-Asiatic Bank against Guaranty Trust Co., both because of his 1927 attachment lien, and because of his state judgment of September 23, 1935 (R. 76-87). Petitioner thereupon filed an answer and a cross bill in equity and counterclaim against the receivers and defendant Guaranty Trust Co. for the said amount of his lien and the judgment (R. 88-123).

In 1927, neither the Government of the United States nor the State of New York recognized Soviet Government or its laws, and Russo-Asiatic Bank, a corporation organized under the laws of the Russian Imperial Government, was deemed by the law and the courts of New York to continue to exist and function as such corporation, not-

withstanding any Soviet legislation to the contrary. Subsequent to the recognition of the Soviet Government by the Government of the United States on November 16, 1933, the recognition terms accepted both by the American Government and the Soviet Government expressly excepted from the effects thereof acts done in the United States by any of its nationals relating to property credits or obligations of any government of Russia or nations thereof. Thus, the recognition terms expressly left valid and in force petitioner's attachment lien on the dollar indebtedness due to Russo-Asiatic Bank from Guaranty Trust Co.

On November 16, 1933 (the Soviet recognition date), the first outstanding attachment was that of Equitable Trust Co. for $500,000 which was not vacated or discharged until October 7, 1935, when an order to that effect was entered in the New York Supreme Court for New York County (R. 1663). One of the orders obtained in the petitioner's action by Messrs. Evarts, Choate, Sherman & Leon, the attorneys, who appeared for the Russo-Asiatic Bank, but whom the New York courts held unauthorized (*T'ssaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37), was an interlocutory order of April 28, 1933 purporting to vacate ex parte petitioner's warrant of attachment (R. 417). Thereafter, by an order made on September 20, 1935, New York Supreme Court holding that a warrant of attachment was duly granted to petitioner and was duly levied on the indebtedness of Guaranty Trust Co. to Russo-Asiatic Bank and that petitioner complied with all other requirements of New York law and submitted proper proof of his causes of action, directed that a judgment should be entered in his favor in the sum of $210,497.20 (R. 2755-2757), which was done.

Under New York law, the lien of petitioner's attachment merged in the judgment, but the date of that lien

related back to August 24, 1927, when the attachment was levied. Furthermore, under New York law, when the immediately preceding attachment of Equitable Trust Co. was vacated on October 7, 1935, releasing $500,000 of attached funds of Russo-Asiatic Bank, the said attached sum became immediately subjected to petitioner's attachment lien, as the next succeeding attachment in priority. In other words, at the time of the assignment of the funds of Russo-Asiatic Bank made by the Soviet Government to the United States on November 16, 1933, there was a valid and subsisting attachment lien for $500,000 on the indebtedness of Russo-Asiatic Bank from Guaranty Trust Co. which, by operation of New York law, thereafter enured and became applicable to the discharge of petitioner's attendant lien.

The Courts below denied to petitioner the benefits of the Fifth Amendment to the Federal Constitution and of the "Full Faith and Credit" clause therein on the ground that "Tillman is beset with procedural difficulties" in the State Court (R. 9305), as if procedural difficulties in the State Court affected the applicability of said constitutional provisions to his lien and his State judgment.

Companion Applications for Certiorari

Irwin Steingut and Harold E. Blodgett, the New York receivers of Russo-Asiatic Bank, have applied for writ of certiorari in this case. The Guaranty Trust Company also filed its petition for writ of certiorari in the two companion actions of *U. S.* v. *Guaranty Trust Co.*

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 347 (a). The judg-

ment of the Circuit Court of Appeals was filed on May 7, 1947 (R. 3571-4).

The application of this petitioner for writ of certiorari is based on the record on appeal filed in this Court on August 1, 1947, by Guaranty Trust Company of New York in its application for a writ of certiorari, in the cases of *U. S.* v. *Guaranty Trust Co.* jointly tried with and appealed from below on a single record with this case, as well as on the record filed by the receivers in their said application for a writ of certiorari in this case.

Questions Presented

1. Do the Federal policy and the provisions of the Fifth Amendment to the Federal Constitution permit application by the Federal Courts of the Soviet confiscatory decrees against the lien of the petitioner, an American national, duly levied under New York State law on dollar deposits of Russo-Asiatic Bank with Guaranty Trust Company in New York State?

2. Is an outstanding attachment lien duly levied under New York State law by an American national before November 16, 1933 (the Soviet recognition date) against the dollar accounts of Russo-Asiatic Bank with Guaranty Trust Co. in New York City, superior to the confiscatory title of the United States acquired under the Litvinov assignment?

3. Can an American national be deprived of a valid lien acquired under state law against property located in the State by a Federal executive agreement?

4. Can Federal courts examine into "procedural difficulties" in the state court and refuse to give "Full Faith and Credit" to a valid and outstanding state judgment, unattacked for fraud or lack of jurisdiction?

5. Can Federal courts refuse the application of the state statutes to an attachment lien secured under the state law providing that the senior attachment liens inure for the benefit of junior attachment liens in the order of their priority?

6. Can the Federal courts under "Full Faith and Credit" clause of the Federal Constitution examine into the decision of the state court vacating *nunc pro tunc* interlocutory orders, because entered by unauthorized attorneys, affecting the lien of attachment secured under state law and forming the basis of a valid and subsisting state judgment?

Reasons for Allowing the Writ

1. In the *U. S.* v. *Pink,* 315 U. S. 203, and in *U. S.* v. *Belmont,* 301 U. S. 324, this Court expressly left open for future determination the question whether under the Litvinov agreement of November 16, 1933 the Soviet nationalization decrees or any similar foreign decrees of confiscatory nature, should be given extra-territorial effect so as to reach property rights duly acquired in the United States under American laws prior to November 16, 1933.

The question is squarely presented for decision in this case since the petitioner, an American national, was deprived by the decision below of a vested lien in the New York assets of Russo-Asiatic Bank acquired under New York law both by virtue of the attachment and by virtue of the state judgment based thereon. The decision below conflicts with the settled public policy of the United States against confiscation (*Compania Espanola* v. *Navemar,* 303 U. S. 68, 75; *Ingenohl* v. *Olsen & Co.,* 273 U. S. 541, 544-5; *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552; *Baglin* v. *Cusenier Co.,* 221 U. S. 580; *Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. (2nd) 296, 401, cert. den. 275 U. S. 571), which extends the bene-

fit of the Fifth Amendment to the Federal Constitution even to friendly aliens (*Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481; *Truax* v. *Raich*, 239 U. S. 233, 239; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing* v. *U. S.*, 163 U. S. 228, 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369), let alone to the petitioner, an American citizen.

In a case involving the scope of the operation of the Litvinov assignment, this Court held that it did not wipe out even an existing technical defense of an American national, still less a property lien of a citizen of the United States, in which category petitioner's lien falls (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 143).

The Litvinov assignment expressly excepted from its operation "*acts done* or settlements made by or with the Government of the United States or public officials in the United States or its nationals, *relating to property, credits, or obligations of* any government of Russia or *nationals thereof*" (Exhibit 26). Hence, petitioner's lien, a property right of an American citizen, lawfully acquired by him on August 24, 1927 (R. 746), five years prior to the Soviet assignment to the Government against Russo-Asiatic Bank, a Russian national, is not affected either by the assignment or by any other provision of the Litvinov agreement.

A lien is a property within the meaning of the Fifth Amendment. (*Worthen Co. ex rel. Board of Com'rs* v. *Kavanaugh*, 295 U. S. 56, 60; *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, 618; *Worthen Co.* v. *Thomas*, 292 U. S. 426, 432; *Central Savings Bank* v. *City of New York*, 279 N. Y. 266, 277; *Stuart* v. *Palmer*, 74 N. Y. 183, 189.)

2. The Courts below failed to hold that outstanding attachments against New York assets of Russo-Asiatic Bank and the judgments thereon based, obtained in New York state courts, constituted a fatal impediment to the

claim of the United States, The Courts below failed to apply New York substantive law as to New York attachment liens and the effect of levies made thereunder, thereby violating the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. (*Embree* v. *Hanna,* 5 Johns. 101; *Prahl Construction Corp.* v. *Jeffs,* 126 Misc. 802; *Edison Electric Co.* v. *Guastavino Co.,* 16 A. D. 350; *Lynch* v. *Carey,* 52 N. Y. 181; *Frost* v. *Mott,* 34 N. Y. 253; *Matter of Dawson,* 110 N. Y. 114, 118; *McGuire* v. *Ross,* 11 Abb. Pr. N. S. 20; and *West Virginia Pulp & Paper Co.* v. *People's Home Journal,* 233 A. D. 376.)

3. The Courts below misapplied the "Full Faith and Credit" provisions of the Federal Constitution. The rule for the application of said clause is well established. It bars every consideration of any matters which the Courts entering judgment had or should have passed upon in order to direct a judgment. No procedural difficulties or irregularities may be considered by the Federal Court, asked to enforce a judgment of a State Court unimpeached for lack of jurisdiction or for fraud. The Federal Court conclusively assumes that the judgment was regularly entered in the State Court, unless impeached for lack of jurisdiction or for fraud. (*White* v. *Crow,* 110 U. S. 183, 189; *McGoon* v. *Scales,* 79 U. S. 23, 31.)

The Courts below denied to the petitioner his constitutional privileges, because, allegedly, his prosecution of the state action was "beset by procedural difficulties" (R. 9305). The Federal Courts cannot inquire into mere procedural or other irregularities in the State Court occurring prior to the entry of the state judgment (none are mentioned in the opinions of the Courts below, and none appear in the record herein). (*Cooper* v. *Reynolds,* 10 Wall 308, 315-16; *Fox* v. *McGrath,* 152 Fed. (2) 616-7).

4. The Courts below declared that on November 16, 1933, "no attachment was in effect against any property

of Russo-Asiatic in the hands of Guaranty Trust" (R. 9309). The undisputed evidence in the record shows that on that date there were the following attachments levied under the dollar account of Russo-Asiatic Bank with Guaranty Trust Company in New York City:

> Equitable Trust Co. for $500,000 on January 13, 1920; Herbert J. Grant on March 13, 1933 for $537,515.80; Jesse C. Millard on March 28, 1933, for $200,000; and Estate of Serge Friede on September 25, 1933, for $800,000 (R. 1658).

It is settled law that an assignment subsequent to the levy of an attachment is subject to and inferior in title to the prior attachment lien. (*Tilton* v. *Cofield,* 93 U. S. 163, 168; *Hovey* v. *Elliot,* 118 N. Y. 134, 138; *West Va. Pulp & Paper Co.* v. *People's Home Journal,* 233 A. D. 375, 378-9; *McGinn* v. *Ross,* 11 Abb. Pr. N. S. 20, 26.)

Under sections 960, 961, 681, 680, of New York Civil Practice Act, all of these attachments inured for the benefit of petitioner, a prior attaching creditor for $188,408 (*Lopez* v. *Campbell,* 163 N. Y. 340, 349; *Gillig* v. *Treadwell Co.,* 148 N. Y. 177, 180-1; *Pach* v. *Gilbert,* 124 N. Y. 612, 620-1; *Wheeler* v. *Smith,* 11 Barb. 345, 347).

Apart from overlooking the above important facts, the Courts below gave undue importance to the erroneous ex parte order of the State Court made on April 28, 1933, temporarily vacating petitioner's warrant of attachment (R. 9309-10). Said order was vacated on July 13, 1935 (R. 412, 420). "The entry of the (interlocutory) order vacating the attachment did not annul the warrant of attachment" (*Norden* v. *Duke,* 47 Misc. 473). The interlocutory orders in New York have no force of *res judicata* (*Steuben Co. Bank* v. *Alberger,* 83 N. Y. 275, 278; *Riggs* v. *Pursell,* 74 N. Y. 370, 378-9; *Belmont* v. *Erie R. R. Co.,* 52 Barb. 637, 642).

Under the law of New York, when the ex parte order vacating petitioner's warrant of attachment was set aside, the warrant deemed to have existed in full force and effect all the time from its inception on August 24, 1927. "The effect of setting aside the order vacating the warrant of atachment was to give it validity in the hands of the Sheriff as of the date when it was issued." (*Pach* v. *Gilbert,* 124 N. Y. 612, 619; *Milliken* v. *Fidelity & Deposit Co.,* 129 A. D. 206, 214; *Fried* v. *Weissenthanner,* 27 Misc. 518-9.)

The ex parte order of April 28, 1933 was vacated on July 13, 1935, because it was procured by attorneys unauthorized to appear for the Russo-Asiatic Bank (R. 414, 416-7). The Russo-Asiatic Bank, being a non-resident foreign corporation in New York, any order procured in its behalf by unauthorized attorneys was void *ab initio.* The warrant of attachment remained in the same condition as if the ex parte proceedings had not been taken. (*Vilas et al.* v. *Plattsburgh & M. R. Co. et al.,* 123 N. Y. 440; *Amusement Securities Corp.* v. *Academy Pictures Distributing Corp.,* 251 A. D. 227; *Stock* v. *Mann,* 229 App. Div. 19, 20, aff'd 255 N. Y. 100; *Duimo* v. *Arbuckle,* Nos. 1 & 2, 166 App. Div. 86; *Myers* v. *Prefontaine,* 40 App. Div. 603; *Matter of Estate of Stephani,* 75 Hun. 188; *Nordlinger et al.* v. *De Mier et al.,* 54 Hun. 276.)

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issued out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a date to be designated, a full and complete transcript of the record as printed in the appendices to the briefs of Guaranty Trust Company and the United States, and

of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court, conformably to the review had in other important cases arising under the Litvinov assignment; that the judgment and decision of the Circuit Court of Appeals therein be reversed; and that your petitioner be granted such other and further relief as may be proper.

JAMES A. TILLMAN,
Petitioner.

By BORRIS A. KOMAR,
Solicitor for Petitioner,
36 West 44th Street,
New York 18, N. Y.

BORRIS M. KOMAR,
DAVID L. SPRUNG,
of Counsel.

New York, August 5, 1947.

Brief in Support of Petition

The petitioner in support of his petition relies upon authorities cited in the petition, and also hereby adopts the formal part of the brief and the argument presented under Point II (pp. 27-31) and Point IV (pp. 34-37) of the brief filed in support of the petition for writ of certiorari by Guaranty Trust Company of New York in the companion cases of *United States of America* v. *Guaranty Trust Company of New York.*

Respectfully submitted,

Borris M. Komar,
Counsel for Petitioner.

David L. Sprung,
of Counsel.